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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

WALTER J. HICKEL, Secretary of the Interior,

Petitioner,

—v.—

THE OIL SHALE CORPORATION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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No. 221

WALTER J. HICKEL, Secretary of the Interior,

Petitioner,

—v.—

THE OIL SHALE CORPORATION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

At the outset it is necessary to note a lack of clarity as to the scope of the Petition. The opinion of the court of appeals below covered four separate civil actions (App. 1a-5a),[1] and that court entered four separate judgments which affirmed four separate judgments of the district court. The argument in the Petition mentions all four cases as if review were sought of all. However, had that been intended, then pursuant to this Court's Rule 23(j) the Petition would have set forth all four judgments. In fact, the Petition entirely omits the judgments in three of the cases, Nos. 9582, 9583, and 9584 in the court of appeals, and includes only the judgment in No. 9581 (the *"TOSCO"* case).[2] This brief is submitted on be-

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[1] References to "App." are to the Appendices to the Petition.

[2] The two references at page 1 of the Petition to "the judgment" likewise suggest an intention to obtain review only of one case.

half of the oil shale claim owners in that case, and on behalf of the owners in No. 9584 (the *"Brown"* case), without conceding that the latter case is properly before this Court.

Jurisdiction and Opinion Below of the District Court

In view of the omission from the Petition of the following information called for by paragraphs 1(a) and 1(g) of Rule 23 of this Court, respondents note that the opinion of the district court (App. C to the Petition) is reported at 261 F. Supp. 954, and that the bases for federal jurisdiction in the district court were 28 U.S.C. 1331, 1361 and 2201 and 5 U.S.C. 701-04.

Statutes and Regulations Involved

1. *The General Mining Act of 1872.* The Act of May 10, 1872, 17 Stat. 91, sections 22, 26, 28, and 29 of Title 30, U.S.C. provides as follows:

> "[A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

> "The locators of all mining locations made on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as

they comply with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment . . . ."

"On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year . . . . [U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

"A patent for any land claimed and located for valuable deposits may be obtained in the following manner . . . . The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States supervisor of surveys that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors . . . ."

2. *The Mineral Leasing Act of 1920.* The Act of February 25, 1920, 41 Stat. 445, sections 241 and 193 (the excepting clause) of Title 30 U.S.C., provides as follows:

"The Secretary of the Interior is authorized to lease . . . any deposits of oil shale belonging to the United States . . . ."

"The deposits of . . . oil shale . . . herein referred to, in land valuable for such minerals . . . shall be subject to disposition only in the form and manner provided in section . . . 241 . . . of this title, except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

3. *Interior Department Regulations.* Section 3420.4 of Title 43, C.F.R. (1969), provides as follows:

> "The annual expenditure of $100 in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes (30 U.S.C. 28), is, with the exception of certain phosphate placer locations, validated by the act of January 11, 1915 (38 Stat. 792; 30 U.S.C. 131), under which regulations were issued March 31, 1915 (Circ. 396), 44 L.D. 46, solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts."

This regulation has long been in effect. See *e.g., Regulations,* 37 L.D. 757, 769 (1909); *Regulations,* 49 L.D. 58, 73 (1922).

Questions Presented

The single question presented in the Petition consists of or comprises the following more particular questions, which Respondents submit as more accurately reflecting the terms and circumstances of the actions below.

1. Whether under federal statutes governing the disposition and management of public land, the Department of the Interior had subject matter jurisdiction with respect to the performance of annual work on unpatented mining claims (so-called "assessment work") so that it could invalidate such claims for a default in performance of such work.

2. Whether, on the assumption that Interior had jurisdiction but erroneously interpreted the statutes in declar-

ing mining claims invalid for default in performance of annual work, the owners of the claims are now barred by laches from obtaining judicial relief from such legal error.

3. Whether this Court should now overthrow the established construction of the statutes, including that in two unanimous decisions of this Court, that default in performance of annual work does not terminate a mining claim.[2]

Statement

The Statement in the Petition misconceives the actions taken in the present and prior proceedings and the facts established by the evidence admitted at the trial in the district court, and omits many material facts, thereby necessitating this response.

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[2] The Petition does not raise the following questions, all of which have been presented below: Whether after losing two test cases in this Court on the assessment work question, Interior itself took remedial action to render ineffective prior administrative decisions purportedly cancelling oil shale claims, including those involved here, for failure to perform assessment work. Whether from 1935 until the 1960's Interior promulgated and consistently maintained and applied a rule that those assessment work decisions were ineffective. Whether the assessment work decisions purportedly cancelling the *TOSCO* claims were defective for failure to obtain personal jurisdiction of some of the owners. Whether *Union Oil Company of California*, 71 I.D. 169 (1964), could possibly constitute a decision invalidating the *TOSCO* claims, inasmuch as those claims were not involved in *Union Oil*. Whether *Union Oil* is procedurally defective, and thus an ineffective adjudication, even as to the claims that *were* involved in it, in that the claim owners who were parties were given neither notice of the issues upon which the decision was rested nor opportunity for a hearing to present evidence in defense of their rights.

The Origin of the Mining Claims in Suit

The decision below concerns oil shale mining claims located in northwestern Colorado pursuant to the mining laws prior to enactment in 1920 of the Mineral Leasing Act. That Act withdrew oil shale, and the other enumerated minerals,[4] from claim location and patent under the mining laws and as to them substituted a leasing system, expressly preserving, however, pre-existing valid claims. Under the mining laws thus applicable to the claims in suit, as "established by innumerable decisions of this Court" (*Wilbur* v. *Krushnic*, 280 U.S. 306, 316), the location of a mining claim in conformity with the law

> "has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States... The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent" (*id.* at 316-317).

The free grant of property thus provided for by statute arises upon the discovery of a valuable mineral and the location of the claim, that is, the marking off of the claim on the ground and, where required by state law, the filing of a certificate of location in the county office for real estate records. As the Department of the Interior has long recognized, there is not, and never has been, provision for

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[4] Originally coal, phosphate, sodium, oil and gas.

any filing of a notice of a mining claim in any Federal office, and the claim itself comes into existence without any application to or intervention by any Federal department.[5] It is the statute and not the Department which grants the public property to the citizen who complies with its terms.

The statutory scheme thus distinguishes between the possessory right for mining purposes that arises from a valid mining claim and the complete fee simple title that arises from patent to the owner of the claim from the United States. This latter title is obtained only upon application therefor to the Department of the Interior and the satisfaction of the statutory requirements for patent, including evidence that at least $500 worth of work has been performed for the benefit of each claim for which patent is sought. The claim owner has never been obliged to apply for patent, but if a claim owner who has not obtained patent does not perform at least $100 of work annually on his claim (assessment work), he runs the risk that it may be relocated by another for the same or some other mineral. 30 U.S.C. 28.

Against this background the claims in suit were located at various dates between 1915 and 1920, when interest in oil shale in the so-called Green River Formation in northwestern Colorado and adjacent parts of Utah and Wyoming was aroused by a complex of circumstances given dramatic underscoring by the First World War: the dependence of modern society on oil, the obviously finite quantity of conventional well petroleum, the extraordinary richness and thickness of the oil shale strata of the Green

[5] *David W. Harper*, 74 I.D. 141, 150 (1967); *The Clipper Min. Co.* v. *The Eli Min. & Land Co.*, 34 L.D. 401, 410 (1906).

River Formation,[6] the contemporary success of the Scottish oil shale industry, and various steps taken by the United States Government which gave dimension to the economic value of the Green River Formation—*e.g.*, the classification by the United States Geological Survey of the oil shale lands as mineral lands on account of their oil shale value and the segregation of portions of the area in Naval Oil Shale Reserves. Shortly after enactment of the Mineral Leasing Act, the first application for patent to oil shale claims in Colorado came before the Department for adjudication and the Department formally ruled that oil shale of the Green River Formation was a valuable mineral within the meaning of the mining law capable of patent (*Instructions*, 47 L.D. 548 [1920]), and issued the first of many oil shale patents.

Interior's Investigation and Challenge of Oil Shale Claims

During the latter 1920's the Department inaugurated a campaign to investigate oil shale claims in the Green River

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[6] Investigations subsequent to enactment of the Mineral Leasing Act have shown that the early evaluations of the oil content of the richest portion of the Formation, the so-called Piceance Creek Basin in Colorado, were very conservative. It has since appeared that the subterranean deposits in the center and north-central parts of the Basin are vastly thicker and richer than those exposed on the cliffs at the southern margin. *E.g.*, *Tertiary Geology and Oil-Shale Resources of the Piceance Creek Basin Between the Colorado and White Rivers Northwestern Colorado*, U.S.G.S. Bulletin 1082-L (1961), pp. 867-68. Because the valid location of a mining claim requires an exposure of the mineral, claim location focused on the southern portion of the Basin where the claims in suit lie, and the richer portion was never the subject of oil shale claims. This portion, which is unencumbered Federal land so far as pre-1920 oil shale claims are concerned, contains more than 80% of the estimated oil content of the oil shale in Colorado (Deft. Ex. L, R. 893, 7547 in No. 9581). It is unaffected by this litigation.

Formation and, where grounds therefor existed, to challenge the claims in administrative contest proceedings (Pl. Ex. 2, R. 1514; Pl. Ex. 3, R. 1516).[7] The grounds upon which contests were brought included not only such familiar bases for questioning the validity of any mining claim as lack of a discovery, abandonment[8] and fraudulent location, but also the ground that the claim had been forfeited to the United States for failure to perform at least $100 of assessment work in each year since enactment of the Mineral Leasing Act (Pl. Ex. 5, R. 1522-23; Deft. Ex. A, R. 882, 6015). This last ground was asserted by the Department on the basis of the Mineral Leasing Act of 1920. The Government argued that because it had a continuing proprietary interest in leasing the lands and because the Mineral Leasing Act had eliminated the possibility of a relocation of oil shale claims,[9] the consequence of a default in performance of annual assessment work should be automatic termination of the claim in favor of the

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[7] Each of the four cases below is represented by a separate record. However, at the trial the evidence common to the four cases was entered only in the record of the *TOSCO* case and thus is to be found in the record of No. 9581 in the court of appeals. Except as otherwise noted, references to the record below or to "R." are to the record in the court of appeals in No. 9581.

Plaintiffs' Exhibits 1-307 were all received in evidence together at R. 863, subject to objection to individual exhibits. Those relatively few objections were uniformly overruled, R. 918-934. Accordingly, record references hereafter to any of these exhibits omit the page at which they were admitted to avoid repetition of the identical reference.

[8] See *Gabbs Exploration Co.* v. *Udall*, 315 F.2d 37 (D.C. Cir.), *cert. denied*, 375 U.S. 822 (1963), for an example of a decision on grounds including abandonment.

[9] *But see* the Multiple Mineral Development Act of 1954, 30 U.S.C. 521-531.

Government, whether or not the work had been resumed prior to the contest. This position was sharply contested by oil shale claimants, but the Department purported to cancel the claims for non-performance of the work. *Emil L. Krushnic,* 52 L.D. 282 (1927); *On Rehearing,* 52 L.D. 295 (1928).

Following the first Departmental decision in *Krushnic,* the Commissioner of the General Land Office directed the commencement of proceedings in Contests 11757, 11759 and 11761 against the Bute, Camp Bird, and Atlas claims, respectively, involved in the *TOSCO* case below on the single charge of a failure to do assessment work (Pl. Ex. 8, R. 1554-55; Pl. Ex. 10, R. 1558-59; and Pl. Ex. 12, R. 1562-63). On that same ground the Commissioner on May 4, 1928, declared the claims null and void (Pl. Ex. 9, R. 1556-57; Pl. Ex. 11, R. 1560-61; and Pl. Ex. 13, R. 1564-65). Contest 12039 against the four Oyler claims involved in the *Brown* case below was similarly initiated in 1929 on the assessment work ground (Pl. Ex. 14, R. 1566-67; Pl. Ex. 244, R. 2255), but before any decision in that contest, this Court in *Wilbur* v. *Krushnic,* 280 U.S. 306, unanimously held that the Secretary's decision in the *Krushnic* case, *supra,* was "contrary to [the] explicit terms" of the Mineral Leasing Act (*id.* at 319). This Court rejected the argument that the Mineral Leasing Act conferred upon the Government the status of a rival locator, and stated that a mining claim was maintained, within the meaning of the excepting clause of the Mineral Leasing Act, by resumption of assessment work "unless at least some form of challenge on behalf of the United States to the valid existence of the claim" intervened before resumption of the work.

The Department regarded *Krushnic* as a test case.[10] Following that decision the Department accordingly recognized that the pre-*Krushnic* decisions against the *TOSCO* claims were "not tenable" (Pl. Ex. 25, R. 1597) and similarly that further proceedings on the pre-*Krushnic* complaint against the *Brown* claims would be "ineffective" (Pl. Ex. 37, R. 1621; Pl. Ex. 38, R. 1622-23).

As Secretary Wilbur stated, "in order to test out the extent of authority (if any) left to us by the Supreme Court decision,"[11] the Department promptly renewed the assessment work campaign on modified lines. The new theory was that if the Land Office behaved as a rival locator, and moved to take advantage of a continuing default in annual work before the work was resumed, it could thereby terminate an oil shale claim. Accordingly, new field investigations were conducted and, where it appeared that annual work continued in default, three kinds of action were taken. First, a hopefully timely and effective "challenge" was asserted by posting on each claim a printed notice that the annual work was in default and that, during such default, the United States had taken possession of the claim. Second, a proceeding was brought, by the filing and service of a contest complaint alleging the facts in the first step. Third, a decision was rendered declaring the claim null and void.

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[10] Secretary Wilbur testified as follows before the Senate Committee on Public Lands, 1931: "As to oil shale land, the question of the Department's jurisdiction was, when I took office, under review by the Courts in the case of *Wilbur* v. *Krushnic*. The decision of the Court of Appeals in that case had held on January 7, 1929, that the Department was without authority . . . . The Supreme Court decision in that case came down on January 6, 1930, affirming the Court of Appeals . . . in that test case" (Pl. Ex. 47, R. 1667).

[11] *Loc. cit. supra*, note 10.

In embarking upon this second phase of the assessment work campaign, the Department recognized that its subject matter jurisdiction was in question, and that a second test case would be taken to the courts.[12] When that test case (*Virginia-Colorado*) was taken to court, the Department in 1933 suspended the entire annual work campaign to await the outcome. The Department's Annual Report for 1934 explained that the annual work campaign had been suspended "awaiting court decision on *jurisdiction* of the Department to challenge the validity of oil-shale locations for failure to perform annual labor thereon" (emphasis supplied) (Pl. Ex. 44, R. 1653).[14]

Before Interior suspended the second phase of the assessment work campaign, and in accordance with the revised post-*Krushnic* procedures, the Commissioner of the General Land Office directed renewed proceedings against the *TOSCO* and *Brown* claims. It had proceeded to investigate anew the claims in controversy here, to post chal-

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[12] Interior's statement of September 29, 1930 (Pl. Ex. 19, R. 1583) noted that "the right of the department to challenge locations . . . for failure to do assessment work has been vigorously denied by oil shale claimants . . . . [T]here are now pending in the department test cases which the locators asserted they plan to take into court." Interior's Annual Report for 1930 noted that *Krushnic*, although it "sustained the claimants on the issue of assessment work . . . left the possibility (though no certainty) that if the remaining claims were posted before resumption of work on the claim, a different result would follow . . . . A second test case in the courts may be expected" (Pl. Ex. 15, R. 1568).

[13] After the trial court ruled in favor of the *Virginia-Colorado* claimant, Secretary Ickes emphasized to the Attorney General the importance of obtaining appellate review, saying the case "may be regarded as a test case" (Pl. Ex. 43, R. 1651-52).

[14] Similarly, action on a pending appeal within Interior was suspended "in view of the pendency of [*Virginia-Colorado*] challenging the authority of the Department" with respect to assessment work (Pl. Ex. 45, R. 1658).

lenges on them, to bring contest proceedings against them, and to declare, in 1930-1932, some, but not all, undivided interests in them null and void.[15]

On June 3, 1935, this Court ruled broadly that all three aspects of the second phase of the annual work campaign: (1) the posting of the challenges on the claims, (2) the institution of contest proceedings, and (3) the rendering of decisions therein—"went beyond the authority conferred by law." *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, 647.

Interior's Response to the Prior Decisions of This Court

The Petition states (p. 2) that, after *Virginia-Colorado*, the *TOSCO* and *Brown* claims "remained cancelled on the Department's records," but that is not so (except in the sense that the prior papers were not destroyed).[16] En-

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[15] The Petition does not accurately state what happened in this second phase. It gives 1931 as the last date for a "cancellation"; in fact, the Secretary's ruling on the *Brown* claims came on March 10, 1932 (Pl. Ex. 41, R. 1639-41). It states that the claimants in only one of the four actions below carried their cases to the Secretary. In fact, two did: in *Brown* as just noted, and in *Umpleby* (the decision of Assistant Secretary Edwards, *L. Z. Harrison, Joseph B. Umpleby et al.*, A-15072, Nov. 29, 1930, is Exhibit A-1 to the complaint, R. 14 in No. 9582). The Petition implies that the *TOSCO* claims were "cancelled" entirely; in fact, as the Government conceded below (appendix to post-trial brief to the district court, pp. 74-87), less than 50% of the interests therein were cancelled before the entire annual work campaign was suspended.

[16] After *Virginia-Colorado*, Land Office officials in Washington called in from the local land offices all of the official files of the annual work contests (Pl. Ex. 71, R. 1741-42; Pl. Ex. 72, R. 1743-45; Pl. Ex. 74, R. 1748-53), and they were placed in storage in the Federal Records Center in Alexandria. They were thereafter resorted to only in processing subsequent patent applications, since

larging on this groundless assertion, the Petition then asserts (pp. 11, 12) that the Land Office subsequently relied upon these cancellations, but that is not so, as the evidence makes unmistakably clear and as the Government itself conceded in the district court. The record is replete with documents showing unequivocally that the Land Office did not rely upon the annual work decisions, but instead regarded them as void. The evidence submitted at trial comprises more than 7,000 pages, and cannot be fully stated here.[17] A few examples should suffice; there is no contrary evidence whatsoever, and the evidence consists entirely of Land Office records, save for the depositions of two Land Office employees.

First, just as after this Court's decision in *Krushnic* the Department had recognized that, in fulfillment of its obligation to administer the public lands in conformity with law, its prior decisions contrary to the decision could not stand, likewise after the *Virginia-Colorado* decision

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the reports therein of field investigations often had useful information as to discovery, the performance of patent work, etc. *E.g.*, Pl. Ex. 126, R. 1900; Pl. Ex. 127, R. 1901; Pl. Ex. 309, R. 871-74, 4914, 4933-34. Of course these files contained the annual work decisions, but Land Office personnel who checked these files were specifically instructed "if the charge of failure to do assessment work was the only charge, it was to be ignored, and had been ignored" (Pl. Ex. 309, R. 871-74, 4919).

[17] The Petition plainly errs in describing this evidence as "fragmentary" (p. 9, n. 1). The reason for the error may be that the reference was to the *Union Oil* decision of 1964, not to the evidence presented at trial in 1966. Of course, the evidence in *Union Oil* was fragmentary; there was no notice of charges, and no opportunity for a hearing, and thus no evidence. (Ironically, although *Union Oil* denied the patent applicants' motion for an evidentiary hearing, see App. 54a, it bolstered its rulings against them on the ground that they had made "no clear showing" as to certain facts. App. 72a.)

the Department acted to deprive of effect the assessment work cases previously decided in the renewed campaign. In a published decision three weeks after *Virginia-Colorado,* Interior announced that the annual work decisions were "without authority of law and void" and thus they all were deprived of any effect. *The Shale Oil Company,* 55 I.D. 287 (June 24, 1935) (Pl. Ex. 70, R. 1737-40). That was followed by directions to the local Land Offices to close out assessment work cases then pending there (Pl. Ex. 71, R. 1741-42; Pl. Ex. 72, R. 1743-45; Pl. Ex. 74, R. 1748-53; Pl. Ex. 82, R. 1792; Pl. Ex. 85, R. 1811; Pl. Ex. 87, R. 1813; Pl. Ex. 89, R. 1815; and Pl. Ex. 84, R. 1810), and by the disposition on the authority of the *Shale Oil* decision of appeals then pending either before the Commissioner of the General Land Office or the Secretary (*e.g.,* Pl. Ex. 76, R. 1754-55; Pl. Ex. 77, R. 1756-58; Pl. Ex. 78, R. 1759-73; Pl. Ex. 45, R. 1655-64; Pl. Ex. 79, R. 1774-77; and Pl. Ex. 80, R. 1778-82).

The Department action was shown also in response to inquiries as to the status of oil shale claims supposedly invalidated for failure to perform assessment work. In reply it was uniformly and consistently stated that the Department had invalidated such decisions, as, for example, the Commissioner wrote to an oil shale claimant on July 17, 1935, "any declaration by [the Land Office] that an oil shale placer claim is null and void based solely on a charge that the claimant failed to perform annual assessment work or resume work on the claim is void and does not affect the right of the owner of the claim to maintain his possession thereof under the mining laws" (Pl. Ex. 136-A, R. 1917). The point was also explicitly made that no further administrative action was needed to undo the

prior decisions. For example, the Commissioner wrote to a claimant in 1936:

> "This office considers that it would be unnecessary to revoke its previous decision holding the Lucy Agnes claims to be null and void. That decision being without authority of law is without any effect on the title arising from the location of the claims" (Pl. Ex. 180, R. 2024-25).

A third example is a letter from Acting Secretary West on October 31, 1935, to the Secretary of the Navy that the assessment work decision in Contest 12039 involving the very Oyler claims in *Brown* was (with many other similar decisions) "without effect and void" and that "the status of the claims so far as this Department is concerned is that they are subsisting claims" (Pl. Ex. 176, R. 2013; see Pl. Ex. 177, R. 2014-19 for a list of the claims).

So, too, in 1939 (and in 1941, and 1943, see Pl. Ex. 191, R. 2049-50; Pl. Ex. 194, R. 2054-55), Secretary Ickes wrote to the Congress, in support of remedial legislation:

> "Conceiving that the Mineral Leasing Act conferred such authority upon him, the Secretary of the Interior challenged in departmental proceedings the validity of thousands of these claims. After full hearings the claims were declared void because of default in assessment work. Appeal was taken from these proceedings and in the cases of *Wilbur* v. *Krushnic,* 280 U.S. 306 (1930) and *Ickes* v. *Virginia-Colorado Development Corp.,* 295 U.S. 639 (1935) the Supreme Court held that the proceedings exceeded the authority of the Secretary and were, therefore, without effect. From these decisions it is apparent that, although the performance of annual assessment work is expressly required by law, there is no statutory authority to enforce that requirement" (Pl. Ex. 6, R. 1526).

In 1946, then Acting Secretary Chapman responded to an inquiry from Senator Myers about a 1931 assessment work decision (the same in all material respects as those here), stating that shortly after *Virginia-Colorado,* "in the case of the *Oil Shale Company* [sic] . . . the Department . . . overruled its action in other cases, including this one" (Pl. Ex. 204, R. 2070). In 1959, the Associate Solicitor for Public Lands, Clarence Bradshaw, a veteran of the field investigations in the assessment work campaign (see Pl. Ex. 283, R. 4581-82) and conversant with the intervening land administration (see Pl. Ex. 306, R. 4715; Pl. Ex. 309, R. 871-74, 4918-19, 4949), rejected in a memorandum to the Denver Regional Solicitor's Office what would a few years later be the *Union Oil* hypothesis:

> "In view of the Supreme Court decisions mentioned, the Department in its decision of June 24, 1935, in the *Shale Oil Company* case (55 I.D. 287) held that in that case the Commissioner's decision was without authority of law and void; recalled and vacated certain cited departmental decisions and the departmental instructions of June 17, 1930 (53 I.D. 131); and overruled 'other departmental decisions in conflict with this decision.' Thus in effect the decision of June 24, 1935, recalled and vacated *all* departmental decisions declaring oil shale placer claims null and void solely for failure of the claim owner to do the assessment work, thus leaving the claims as if they never had been contested" (Pl. Ex. 215, R. 2103-04; emphasis in the original).

The record abounds with many similar statements (Pl. Ex. 175, R. 2011-12; Pl. Ex. 192, R. 2050; Pl. Ex. 195, R. 2056; Pl. Ex. 181, R. 2026; Pl. Ex. 180, R. 2024-25; Pl. Ex. 182, R. 2027-28; Pl. Ex. 193, R. 2052; Pl. Ex. 196, R. 2057; Pl.

Ex. 197-199, R. 2058-62; Pl. Ex. 200, R. 2063; and Pl. Ex. 207, R. 2075-76). In view of the wealth of evidence it is thus hardly surprising that, so far from insisting upon the reliance suggested by the Petition, the Government's post-trial brief to the district court (pp. 59-60) conceded:

> "We do not contend that administration of the land was affected by any particular reliance on the early decisions. In fact, the administrators may not have known of the decisions."

The Petition errs also in asserting (pp. 5, 9, n. 4) that the Land Office "for a time stood ready to reopen cancellations," refering to 74,000 acres of claims which were subsequently patented, as if that "time" was severely limited. As the foregoing examples show, the Department's view was (as early as July 1935) that no reopenings were necessary or appropriate[18] for the annual work decisions were void and in any event had all been rendered ineffective by broad remedial administrative action. Moreover, the 74,000 acres were patented, not soon after *Virginia-Colorado*, but over the next 25 years, as patent applications were filed and processed. The evidence shows that such patents issued in every year from 1949 through 1960 for claims that had been purportedly cancelled for failure to do assessment work and that such claims constituted approximately two-thirds of the total of 768 oil shale claims patented in Colorado on applications filed after the *Shale*

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[18] The only example of administrative action to reopen a final decision in an assessment work contest arose out of an inquiry received by the Department after *Virginia-Colorado* but before promulgation of the *Shale Oil* decision; it was thus treated as a pending case when the *Shale Oil* decision was announced (*Joseph D. Ahearn et al.*, A-16739, Pl. Ex. 69, R. 1735-36; see also Pl. Ex. 67-68, R. 1729-1734).

Oil decision (Pl. Ex. 95, R. 1827-42). The Petition simply misstates the evidence in suggesting that the Department's recognition of the invalidity and ineffectiveness of assessment work contest decisions was confined to "the immediate wake of *Virginia-Colorado*" (p. 15).

The Petition is thus wrong both in its assertion that the Department was responsive to this Court's declaration of the law only briefly, and also in its assertion that the Department had relied in administering the lands upon the supposed validity of the assessment work decisions. In 1963, the Assistant Secretary for Public Land Management, reviewing the entire period, concluded in these terms:

> "[A]ll prior adverse decisions, based on assessment work, were ignored, and many patents issued without any question being raised as to the finality of the *Shale Oil* decision in cancelling all prior decisions which were based on assessment work alone" (Pl. Ex. 211, R. 2093).[19]

There is in short an utter absence of evidence that between the *Shale Oil* decision in 1935 and the *Union Oil* proceedings, referred to below, the Department or anyone else ever acted upon the basis that an oil shale assessment work decision was effective for any purpose.

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[19] This statement appears in a letter from the Assistant Secretary to Sen. Clinton Anderson that was introduced in evidence in the district court pursuant to a stipulation in which counsel for the Government agreed that "the matters referred to in the [letter] fell within his jurisdiction as such Assistant Secretary," and that "He was, at the time, generally familiar with the matters referred to in the [letter]" (Pl. Ex. 211, R. 2088).

The Department's Change of Position

The contrary view was first asserted in a series of decisions by the Colorado Land Office Manager which were affirmed on appeal in April 1964. *Union Oil Company of California,* 71 I.D. 169 (App. 47a-84a). In July 1964 the plaintiffs in *TOSCO* initiated the first of the four cases below. That complaint, which involved oil shale claims none of which were before the Department in *Union Oil,* sought only judicial review of the pre-1935 assessment work decisions, and a judgment declaring those decisions to have been without effect and enjoining the Secretary from asserting their effectiveness. The complaint did not seek a patent (no application had been filed for one), nor did it seek any judgment which in any other respect would have affected the Department's power to challenge the validity of the claims on any other ground. The other three cases below were commenced later; the four were tried together. Unlike *TOSCO* the other three cases below involved claims ruled upon in *Union Oil,* patent applications having been filed. In those three cases the plaintiffs thus also sought judgments setting aside the *Union Oil* decision.

The Issues in the Courts Below

The plaintiffs presented in the district court, and renewed on appeal in support of the decision rendered by the district court, three distinct grounds upon which they were entitled to judicial relief from the pre-1935 assessment work decisions (see App. 28a):

1. The decisions were rendered in excess of the subject matter jurisdiction of the Department and were, in con-

sequence, themselves void. This argument rested upon the decisions of this Court in *Krushnic* and *Virginia-Colorado.* It presented the only issue passed upon by the district court and the court of appeals.

2. The Department, following upon this Court's decisions in *Krushnic* and *Virginia-Colorado,* adopted and thereafter consistently applied a rule, from which it may not now retroactively depart, that the pre-1935 assessment work decisions were themselves null and void and without effect. This point would deprive the pre-1935 decisions of present effect, whether or not the decisions in *Krushnic* and *Virginia-Colorado* are regarded as rulings upon the subject matter jurisdiction of the Department (and, indeed, whether or not *Krushnic* and *Virginia-Colorado* were correctly decided on any basis).

3. Again without regard to whether *Krushnic* and *Virginia-Colorado* were rulings upon jurisdiction, it is clear that at least they were holdings that the Department had committed legal error in purporting to cancel oil shale claims for failure to perform assessment work. The pre-1935 decisions being thus legally erroneous and administrative adjudications of the Department being admittedly subject to judicial review and reversal, the plaintiffs are entitled to judicial review and relief from the pre-1935 decisions affecting the claims in suit.

The plaintiffs advanced two further grounds below of less general applicability.

4. The pre-1935 decisions touching the claims in *TOSCO* were confessedly subject to procedural deficiencies in that the then owners of substantial interests in each of the

claims were never joined as parties to the assessment work proceedings. As to those interests, the extent of which was not disputed, the assessment work decisions can have no consequence on any conceivable theory, as the Department's Supplemental Decision in *Union Oil*, 72 I.D. 313, had made manifest as to other claims.

5. As to the four Oyler claims in *Brown* below (and the claims in the other two cases below), the failure of the Department in *Union Oil* to accord notice and an opportunity to be heard as to whether what was in substance the affirmative defense of laches and estoppel, based on events post-1935, could breathe life into the assessment work decisions as the *Union Oil* decision asserted, required that that decision be set aside, whatever the decision on points 1, 2 and 3, *supra*, as to the claims involved.

Reasons Why the Petition Should Be Denied

1. The court of appeals, affirming the district court, rightly construed and applied the prior unanimous decisions of this Court in the *Krushnic* and *Virginia-Colorado* cases to hold that the administrative decisions rendered in the period 1928-1932 were nullities. As the Petition perforce recognizes (p. 7), an administrative decision, no less than the decision of a court, is void if rendered in the absence of subject matter jurisdiction.[20] The

[20] As the Petition also recognizes (*id.*), a defect of process in an administrative proceeding equally deprives the resulting decision of consequence. But it does not, as the Petition inconsistently suggests (p. 7, n. 3), require an application to the Secretary to validate the invalidity. The consequences of defective service

Petition argues, however, that the defect in the assessment work decisions which a unanimous Court noted in *Virginia-Colorado* did not go to the Department's jurisdiction, but only to the manner of exercise of its power. This argument ignores the setting of the *Virginia-Colorado* decision, which shows, as the language of Chief Justice Hughes' decision itself strongly suggests, that it was presented to this Court as a question of jurisdiction.

To appraise accurately the significance of *Virginia-Colorado*, one must consider the earlier, and likewise unanimous, decision of this Court in *Wilbur* v. *Krushnic*, 280 U.S. 306 (1930), which the Petition all but ignores. In that decision the Court rejected as "contrary to [the] explicit terms" of the Mineral Leasing Act Interior's contention that a failure to perform annual assessment *ipso facto* invalidated a claim as against the United States, 280 U.S. at 319. The opinion noted that prior to the passage of the Mineral Leasing Act "annual performance of labor was not necessary to preserve the possessory right . . . as against the United States." Directly contrary to the suggestion (Petition, p. 16) that this Court was not apprised of authorities holding that where the Department had a competing interest in fact (as it did, under the Mineral Leasing Act, as a prospective lessor of oil shale lands), the Government could assert a right of relocation upon default

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are not of merely academic interest, for, although the Petition does not note it, and does not present the question, the Secretary conceded in his post-trial brief to the district court that substantial interests (from 7/16 to 13/16) in every one of the 75 mining claims involved in *TOSCO* were wholly unaffected by the assessment work decisions for this very reason, without regard to any decision in this Court on the question which the Petition does raise.

in assessment work, this line of authority was urged upon this Court in *Krushnic* by the Secretary.[21]

While the Petition ignores the *Krushnic* decision, the Secretary at the time was well aware that it had merely "left the possibility (though no certainty)"[22] that if the Department challenge intervened before the resumption of assessment work a different result might follow. Accordingly, the assessment work campaign was resumed in slightly altered form "in order to test out the extent of authority (if any) left to us by the Supreme Court decision [in *Krushnic*]."[23] It was in the resumed campaign that the assessment work decisions against the claims in suit were rendered. And it was in the course of the same resumed campaign that the administrative decision, *Virginia-Colorado Development Corporation,* 53 I.D. 666, was rendered which became "the second test case in the courts" which the Secretary's 1930 Annual Report had said "may be expected" (Pl. Ex. 15, R. 1568). When the claimants in that case sought judicial review the Secretary on April 1, 1933, suspended all action in then pending oil shale contests "awaiting court decision on jurisdiction of the Department to challenge the validity of oil-shale locations for failure to perform annual labor thereon" (Pl. Ex. 44, R. 1653). It would be difficult, indeed, to propose an analysis

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[21] See 280 U.S. at 308 summarizing the argument of counsel. The *Krushnic* decision was obviously a rejection of this line of authority. The Department itself so understood, for one of these supposedly "well-established" authorities was overruled following the *Krushnic* decision. *Standard Shales Prod. Co. (On Rehearing),* 53 I.D. 42 (1930).

[22] Annual Report of the Secretary for 1930 (Pl. Ex. 15, R. 1568).

[23] Testimony of Secretary Wilbur before the Senate Committee on Public Lands, February 12, 1931 (Pl. Ex. 47, R. 1667).

less apt than the suggestion advanced by the Petition that the *Virginia-Colorado* case was not avowedly presented as a test of jurisdiction.

The language employed by the Court in *Virginia-Colorado* was appropriate as a vehicle for providing an answer to the question thus put. The Court did not, as the Petition suggests, confine its holding to the point that the "cancellations 'went beyond the authority conferred by law'" (Petition, p. 7). What it said was that not only the decision but also "the Department's challenge [and] its adverse proceedings . . . went beyond the authority conferred by law," 295 U.S. at 646-47, or, in the words of the Petition, that there was "the absence of power in the agency to consider the question put" (p. 7).

This reading of the decisions is not only the plain meaning of the words employed. It is consistent with the statutory provision which confers exclusive jurisdiction on the courts (and hence deprives the Secretary of subject matter jurisdiction) to adjudicate rival mining claims to the same ground (30 U.S.C. 30), for it is to such competing claims alone that assessment work has significance.[24] The special statutory treatment of rival mining claims serves to distinguish questions such as the performance of assessment work, which relate only to that subject, from the Secretary's general authority to pass on the validity of mining claims and the decisions of this Court on that different subject to which the Petition refers. This Court in *West* v. *Standard Oil Co.*, 278 U.S. 200 (1929), provided the touchstone: the Secretary has power to make all

[24] That this is the focus of assessment work is recognized explicitly by the Department's regulations. 43 C.F.R. § 3420.4 (quoted *supra*, p. 4).

necessary determinations of fact and law "essential to the performance of the duty specifically imposed" (*id.* at 219).[25] By express statutory enactment the Secretary has no duty to adjudicate rival claims, and assessment work is relevant to no other issue.

2. The Petition has attempted to portray a parade of horribles with dire "implications for the public domain" to give a factitious significance to the issues dealt with by the courts below. This, like the suggestion that the mining claims are barred by laches (see pp. 30-32, *infra*), can be sustained only by ignoring the extensive factual record which is wholly adverse to the Petition's speculations. The administrative practice of the Department following the final defeat of the assessment work campaign in 1935 was noted at some length by the district court (App. 40a-43a) and briefly by the court of appeals (App. 9a). The evidence of this practice "as demonstrated by the record in these cases" (App. 9a) is altogether different from the impression, which the Petition attempts to convey, that it is "fragmentary and inconclusive" (Pet. 9, n. 4). Significantly, the Petition refers for this proposition, not to the record in these cases, but only to the opinion in *Union Oil Company,* where understandably enough the record was scanty, for the Department in that case had failed to give notice to the claim owners who were parties that the matter was at issue or to afford them an opportunity to present evidence on the question in any system-

[25] The Government urged this same analysis, on the authority of *West,* in *Krushnic* in support of its contrary conclusion. Brief for Pet., p. 16. On the basis upon which the case was presented, the Court's conclusion that the Secretary had no duty would lead directly to a holding that he lacked the power.

atic way.[26] Thus the decision refers to six letters (App. 69a, note 30) as if that represented the sum of the matter, whereas the evidence below comprises some 7000 pages, a large part of which is directed to this point.[27]

Far from constituting either a "fragmentary" or "inconclusive" picture, the evidence shows that from the time of the Department's formal announcement of its acquiescence in and implementation of this Court's decisions in its own decision in *The Shale Oil Company,* 55 I.D. 287 (1935), down to the administrative decisions in February 1962, which were affirmed in *Union Oil* in 1964, the Department openly, publicly and consistently treated the assessment work decisions as nullities in any and every context in which the issue of their effectiveness could arise. Thus, there is nothing which has been said by the courts below which creates any "implications for the public domain" (see Petition, p. 17) that are in the slightest degree at variance with the policies for the public domain announced and implemented by a series of Secretaries beginning with Secretary Ickes, whose devotion to the legitimate interests of the public is open to no question. The facts in the voluminous record, in short, conclusively rebut the suggestion in the Petition that Department compliance with

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[26] The *Union Oil* decision denied motions to set the matter for hearing (the decisions of the Land Office Manager having been rendered without any notice or hearing) on the ground that hearings had been held, or had been available, in the old assessment work decisions themselves (App. 48a, 52a-55a). On the issues upon which the decision on the merits was rested, a hearing prior to 1935 would have been immaterial, for the laches point and the related "doctrine of finality of administrative action" (see App. 58a *et seq.*) depend entirely upon facts subsequent to 1935.

[27] Of the 317 exhibits offered by the plaintiffs in *TOSCO,* substantially more than half are directed to this issue.

the rule of law announced in *Virginia-Colorado* and foreshadowed in *Krushnic* was a sometime or briefly continued thing or the further suggestion that to permit the decision below to stand would create in the administration of the public lands altogether novel problems. The charge of novelty would lie only if the Department were now allowed to give conclusive effect to decisions admittedly erroneous when rendered, which in 1935 it deprived of all effect, and which from 1935 until this litigation it treated as nullities.

That there may be several interests in particular land within a mining claim in the public domain under administration by the Department arises from the fact that a variety of public land statutes provide for differing interests until a mining claim is patented, and none of the claims in suit has been patented.[28] That circumstance does not depend upon whether the Land Office declares a mining claim null and void or whether, having done so, the Land Office specifically vacates that declaration. For example, Under Secretary West wrote in 1935, after noting that an assessment work decision against certain oil shale claims was "without authority of law and void," that since no patent application was pending,

> [T]he matter will stand as if no adverse proceedings had been brought . . . . If and when application for

[28] As the court of appeals noted, "the land status in this area has become somewhat complicated . . . but these complications are not essentially different than in any area where there are a considerable number of mining claims. This is one of the Secretary's basic problems in administering lands where the general mining laws are applicable . . . . This involved land status is not the doing of the mining claimants as the Department has proceeded to receive these other [non-mining] entries and to process them regardless of the unpatented claims. It is not a question of laches on either side" (App. 15a).

patent shall be filed for these placer claims such application will be considered on its merits.

In the meantime, so far as the records of the Land Department are concerned, the lands involved appear and are regarded as vacant and unappropriated public lands" (Pl. Ex. 69, R. 1735-36).

The problems of differing uses of these public lands, which were present before the assessment work campaign and posed no great difficulties then, have not actually proven to be of substantial difficulty since then. As noted above, from 1935 through 1960, the Department processed patent applications for oil shale claims, many of which had been attacked in the assessment work campaign, and valid ones proceeded to patent. Second, the Department established, and apparently found quite workable, a procedure whereby it has regulated grazing on oil shale claims until patent issues. See, *e.g.*, Pl. Ex. 63, R. 1715-22; Pl. Ex. 203, R. 2067-69; Pl. Ex. 208, R. 2077; Pl. Ex. 209, R. 2078-82; Pl. Ex. 210, R. 2083-86. See also, *United States* v. *Etcheverry,* 230 F.2d 193 (10th Cir. 1956). At times the Department turned to Congress for assistance in accommodating the differing interests. It supported the Multiple Mineral Development Act of 1954, 68 Stat. 708, 30 U.S.C. 521-531, which facilitates the ready determination of the respective rights of federal mineral lessees and oil shale mining claimants. See Sen. Rep. No. 1610, 83rd Cong., 2d Sess. Similarly, the Department supported the Act of July 20, 1956, 70 Stat. 592, 30 U.S.C. 122, which simplified obtaining patent for the minerals by an oil shale claimant where a patent for the surface had previously been issued and remained outstanding. See Sen. Rep. No. 2524 and H. Rep. No. 2198, 84th Cong., 2d Sess. If, as the Petition asserts (p. 15), "it is essential that there be some stability to the status of the public domain . . . ," it was the

Union Oil decision, not the decisions of the courts below, which upset this established pattern of accommodation of interests.

3. The "Secretary's invocation of laches to bar the present claims" (Petition, p. 13) provides no basis for material distinction between the present case and *Virginia-Colorado,* just as it provides no basis to question the decisions below. It is of course true that judicial proceedings in *Virginia-Colorado* followed upon the administrative decision more quickly than has been true here, but if that greater interval of time is to be given significance the laches defense must be proved, not simply "invoked."[29] That choice of words in the Petition was not inadvertent, for while the Secretary invoked laches in the district court, by pleading it as an affirmative defense, it is conceded that he did not prove it.[30] The answer to the *TOSCO* complaint in the district court asserted that ". . . the United States, relying on the established invalidity of the claims . . . administered the property as being free and

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[29] "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello* v. *United States,* 365 U.S. 265, 282 (1961); see also *Gutierrez* v. *Waterman Steamship Corp.,* 373 U.S. 206, 215 (1963); *Northern Pac. Ry.* v. *Boyd,* 228 U.S. 482, 509 (1913).

[30] In its post-trial brief to the district court (pp. 59-60), counsel for the Secretary stated: "We do not contend that administration of the lands was affected by any particular reliance on the earlier decisions. In fact, the administrators may not have known of the decisions." How adherence to decisions of which the relevant administrators may have been altogether unaware can be essential to the "certainty of [administrative] adjudications" (Petition, p. 10) which, in turn, is "particularly essential in the context of transactions affecting land" (*id.* at 11), the Petition does not explain. Until the Department's *volte-face* in 1964 in *Union Oil,* there was no uncertainty in the matter whatever.

clear of plaintiffs' claims . . . " (R. 35), in terms quite similar to the assertions of the Petition. However, the Secretary in answer to interrogatories addressed to that language in the answer admitted that he "does not know" whether the United States had in fact so administered the lands and, indeed, whether any party had ever entered a transaction "in reliance upon the invalidity of the claims in suit" (Pl. Ex. 313, R. 945, 5180). The answers to interrogatories established beyond question that there is not one whit of evidence in the Department's possession, or in existence to its knowledge, as to any reliance by anyone at any time in any respect on the supposed validity of any of the assessment work decisions (Pl. Ex. 313, R. 945, 5176-80; Pl. Ex. 314, R. 945, 5185-88). This, of course, is simply another perspective upon the Department's long-continued practice of treating the assessment work decisions as nullities and "thus leaving the claims as if they never had been contested" (Pl. Ex. 215, R. 2104).

The *Union Oil* decision, to which presumably the Petition refers in its reference to the invocation of laches, is in any event of no consequence upon the litigation initiated by the plaintiffs in *TOSCO,* for the claims involved in that case were not before the Department in *Union Oil.*[31] The litigation in *TOSCO* is both in its procedural posture and in the substantive issues raised by the complaint, a parallel

[31] The claims in *TOSCO* have never been the subject of a patent application. The Petition (p. 6) is flatly in error in asserting that the plaintiffs in that case "sought a declaratory judgment . . . that the Secretary was required to issue patents on proper application for the ostensibly cancelled claims" and flatly in error in asserting (*id.*) that "the district court found that patents should issue." The plaintiffs sought only a declaration that the old assessment work decisions were invalid and an injunction to restrain reliance upon them (R. 12), and the judgment of the district court was similarly confined (R. 439-442).

to the *Virginia-Colorado* case itself. Even if *Virginia-Colorado* were held to have found the assessment work decisions merely wrong in the exercise of power possessed, that error would be beyond the familiar power of a court to correct it only if suit for judicial review is barred by some affirmative defense. The voluminous record below is devoid of evidence sustaining any such defense, and, had the district court felt it necessary to reach the issue, the plaintiffs would have been entitled to judgment on this alternative ground.[32]

4. The issue which the Petition tenders would neither dispose of the four cases below (assuming *arguendo* that the Petition intends, and is effective, to present all four) nor would it control the broader question of the ultimate validity of the underlying mining claims. Nor, because of decisive procedural defects in both the pre-1935 assessment work cases and in *Union Oil* itself, would any decision which this Court might reach save the burden and expense of further proceedings to which the Petition points (see, *e.g.*, p. 12). Beyond the usual reasons which would weigh against a reconsideration by the Court of its two prior decisions construing the relevant statutes there is, therefore, the further fact that no important issue would be resolved by doing so.[33]

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[32] *Brown* differs in its procedural posture from *TOSCO* in the respect that in *Brown* an application for patent to the claims had been rejected in *Union Oil* on the assessment work ground. The complaint in *Brown* thus sought both judicial review of the *Union Oil* decision and also direct review in the district court of the pre-1935 assessment work decision rendered against the claims (R. 1-11 in No. 9584). In its latter aspect, *Brown* presents the same issues raised in *TOSCO*.

[33] There is no suggestion in the Petition that the question passed on in *Krushnic* and *Virginia-Colorado* is broadly relevant to any

The prior assessment work decisions applicable to the 75 mining claims in *TOSCO* were conceded by counsel for the Government in a post-trial brief to the district court (pp. 74-87 of the appendix thereto) to have been seriously deficient under the standards enunciated recently by the Department itself (*Union Oil Company of California, Supplemental Decision*, 72 I.D. 313) in respect of obtaining personal jurisdiction over the then owners of the claims. As a consequence of those deficiencies, the prior decisions are admittedly ineffective as to substantial fractional interests (from 7/16 to 13/16) in every such claim, irrespective of the merits or validity of the contest decisions themselves. If the validity of the substantial remaining interests is to be determined, further administrative proceedings on other issues are required whatever decision this Court might reach on the question tendered by the Petition.[34]

The claims in the *Brown* case and in the other two cases below were passed upon in *Union Oil Company*, but for the reasons noted above (pp. 26-27) that decision cannot

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significant number of mining claims of other kinds. Nor is there any basis for expecting that it would be, in light of the circumstances that the issues considered in those cases are material only to mining claims which were located prior to 1920 for Leasing Act minerals and which have never been patented.

[34] Similar procedural deficiencies marked the assessment work proceedings involving the claims that *were* before the Department in *Union Oil*. In a supplemental decision in that case the Department ruled that, of the 257 claims involved, personal service on the claim owners in the assessment work proceedings was ineffective as to 218: wholly so as to 117 and partly so as to a further 101. *Union Oil Company of California, Supplemental Decision*, 72 I.D. 313. As to those 218 claims, further proceedings are likewise inevitable, regardless of the merits of the assessment work decisions.

stand because of gross procedural deficiencies in its conduct, again regardless of the merits of the assessment work issue.

The Petition does not present the alternative ground for decision upon the merits of the assessment work issue, which the plaintiffs advanced below (see page 21, *supra*), that, even if *arguendo* it is assumed that the decisions in *Krushnic* and *Virginia-Colorado* did not go to the jurisdiction of the Department, it is undisputed that following those cases the Department itself acted, as of course it had power to do (indeed, the Petition insists upon the Secretary's plenary power), to deprive of effect the prior assessment work decisions. Having done that, and having then adhered to the position thus enunciated, the Secretary may not now retroactively alter the character and effect of the action of his predecessors, upon familiar principles. See, *e.g.*, *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272 (1966); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956); *Lane* v. *Hoglund*, 244 U.S. 174 (1917); *Logan* v. *Davis*, 233 U.S. 613 (1914).

Finally, a decision by this Court would fall still farther short of resolving the ultimate validity of the claims in suit. As the court of appeals noted explicitly, "It must be borne in mind that these proceedings . . . are concerned only with the annual assessment work problem, and not with the many other hurdles which must be crossed by a claimant on the way to patent" (App. 14a). The judgments in the district court, which the court of appeals affirmed, offer no bar to the assertion by the Department of any ground which can be established, including abandonment, lack of discovery, fraud in the location, and the other familiar bases upon which a mining claim can be

challenged. No such questions were presented to the lower courts; the only matter that has been decided is that the assessment work decisions do not afford a proper basis for holding that the claims are invalid. As the district court noted, "there has been no contention that the plaintiffs have abandoned their claims and there is a dearth of evidence to establish acquiescence, express or implied, by plaintiffs in any assumption of jurisdiction by the Department" (App. 46a).[35] The judgment in *TOSCO* goes no further than to declare the assessment work decisions void and to enjoin the Secretary from asserting them against the claims (R. 439-42). The judgment in *Brown*, in addition, set aside the decision in *Union Oil* and simply remanded the patent application to the Secretary "for such further proceedings thereon as may be appropriate" (R. 193-97 in No. 9584).

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

July, 1969

Respectfully submitted,

FOWLER HAMILTON
RICHARD W. HULBERT
DONALD L. MORGAN

[35] The repeated allegations of abandonment in the Petition (*e.g.*, at p. 2, "thousands of oil shale claims were abandoned") have no basis whatsoever in the record. Similarly of no bearing on any issue actually raised in the litigation is the matter of the "reassertion" of the claims (Petition, p. 2). It is undisputed that the owner of a mining claim never need "assert" it by filing a patent application, so that a "delay" in doing so is immaterial.